

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

REGINA BLACKHURST,	)	
	)	2:04-cv-2191-GEB
Plaintiff,	)	
	)	
v.	)	<u>TENTATIVE FINAL PRETRIAL ORDER</u>
	)	
TRINITY CHURCH, and DONNA	)	
HARRELL,	)	
	)	
Defendants.	)	
_____	)	

This Tentative Final Pretrial Order will be used at the Final Pretrial Conference scheduled for Monday, December 12, 2005, at 1:30 p.m. in Courtroom 10.

I. DISPUTED EVIDENTIARY ISSUES

Any evidentiary dispute capable of being resolved in limine shall be addressed using the following procedure. Counsel for the parties are required to meet and confer about the dispute. If the meeting fails to resolve the dispute, the parties are to set forth their respective positions on the dispute in a document entitled "Stipulation Re: Evidentiary Disagreements," that shall

1 be signed by counsel for the parties and filed no later than twenty  
2 (20) court days before trial ("Stipulation").

3 In the Stipulation, after the movant states the legal and  
4 factual basis for opposing admission of a clearly-identified,  
5 specific item of evidence, the nonmovant shall state its position.  
6 *Failure to state a basis for admissibility or non-admissibility of*  
7 *disputed evidence constitutes a waiver or abandonment of that*  
8 *basis.* If the same argument or a portion thereof applies to a  
9 dispute over other evidence, that argument may be incorporated by  
10 reference where that other disputed evidence is argued.

11 This procedure is intended to expedite the trial by  
12 allowing the judge to understand the factual context involving  
13 disputed evidence and to make binding pretrial rulings. The  
14 parties are cautioned that failure to utilize this procedure to  
15 resolve an evidentiary issue which is capable of resolution in an  
16 in limine motion may be deemed a waiver of objection to such  
17 evidence, or could result in a ruling excluding the evidence.<sup>1</sup>

18 II. FACTUAL AND LEGAL CONTENTIONS

19 A. The Final Pretrial Order supersedes the pleadings  
20 and controls the facts and claims which may be presented at trial.  
21 Any legal theory of relief or affirmative defense asserted in the  
22 pleadings but not preserved for trial in this section of the Final  
23 Pretrial Order cannot be raised during the trial. Therefore, to  
24 preserve an issue for trial, and to be entitled to jury

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25  
26 <sup>1</sup> Since the judge disfavors side-bar conferences during  
27 trial, counsel may be informed of this waiver in front of the jury.  
28 Evidentiary disputes addressed in limine need not be included in  
trial briefs as required by Local Rule 16-285(a) (3) (requiring that  
"reasonably anticipated disputes concerning admissibility of  
evidence" be included in trial briefs).

1 instructions on that issue, the issue shall be identified and  
2 preserved in this section of the Order. Failure to do so  
3 dismisses, waives or abandons that issue, claim or defense.  
4 Hotel Emp., et al. Health Tr. v. Elks Lodge 1450, 827 F.2d 1324,  
5 1329 (9th Cir. 1987) ("Issues not preserved in the pretrial order  
6 are eliminated from the action.").

7 B. In the Joint Pretrial Statement ("JPS") the parties  
8 have agreed that the below-listed claims and defenses are to be  
9 tried to a jury. Therefore, the following issues are preserved for  
10 trial provided that jury instructions are submitted as required by  
11 Section X of this Order:

12 1. Plaintiff's Contentions:

13 a. Plaintiff claims Defendant Trinity Church  
14 discriminated against her on the basis of her gender in violation  
15 of Title VII, 42 U.S.C. § 2000, because her pregnancy was a  
16 motivating factor in Defendant's decision to terminate Plaintiff's  
17 employment.

18 b. Plaintiff claims Defendant Trinity Church  
19 discriminated against her in violation of Title VII, 42 U.S.C. §  
20 2000, because her gender was a motivating factor in Defendant's  
21 decision to pay Plaintiff \$1.50 per hour less than a male teacher  
22 who performed the same job as Plaintiff and who was less or equally  
23 qualified as Plaintiff.

24 c. Plaintiff claims Defendant Trinity Church  
25 retaliated against her in violation of Title VII, 42 U.S.C. § 2000,  
26 because (1) after Plaintiff opposed what Plaintiff characterizes  
27 as a demotion to a "floating" teacher Defendant Harrell terminated  
28 Plaintiff, and (2) after Plaintiff complained that her termination

1 was discriminatory Defendant Trinity Church published a defamatory  
2 memorandum that falsely accused Plaintiff of inflicting corporal  
3 punishment on a child.

4 d. Plaintiff claims Defendant Trinity Church  
5 violated the Equal Pay Act, 29 U.S.C. § 206, and California Labor  
6 Code § 1197.5 by paying her \$1.50 per hour less than a male teacher  
7 who performed the same job as Plaintiff and who was less or equally  
8 qualified as Plaintiff.

9 e. Plaintiff claims Defendant Trinity Church  
10 wrongfully terminated her in violation of public policy as  
11 expressed in the California Constitution Article I, section 8, and  
12 in Title VII 42, U.S.C. § 2000, since she was terminated because of  
13 her pregnancy.

14 f. Plaintiff claims Defendant Trinity Church  
15 and Defendant Harrell defamed Plaintiff's reputation when Defendant  
16 Harrell sent a memorandum to others within Trinity Church and to  
17 the Department of Health and Human Services which falsely stated  
18 that Plaintiff had engaged in corporal punishment of a child and  
19 was insubordinate.

20 g. Plaintiff claims Defendant Trinity Church  
21 and Defendant Harrell are liable for defamation for Plaintiff's  
22 republication of the false statements because it was foreseeable  
23 that Plaintiff would have to republish the allegations while  
24 pursuing subsequent employment after her termination.

25 h. Plaintiff claims that Defendant Trinity  
26 Church and Defendant Harrell are liable for intentional infliction  
27 of emotional distress because Defendants intentionally or  
28 recklessly engaged in outrageous conduct that caused Plaintiff to

1 suffer severe emotional distress. This claim is based on all or  
2 part of the following allegations:

3 i. after it became known Plaintiff was  
4 pregnant, Harrell removed Plaintiff from the lead Jr. Kindergarten  
5 teacher position previously promised to Plaintiff, stating to  
6 Plaintiff that now she was pregnant, a more responsible teacher was  
7 needed;

8 ii. two weeks later, Harrell hired  
9 Plaintiff's pregnancy-leave replacement before discussing with  
10 Plaintiff her pregnancy or her needs, then requesting Plaintiff  
11 train the replacement for six months, creating fear Plaintiff's  
12 employment was tenuous because she was pregnant;

13 iii. after hiring Plaintiff's replacement,  
14 requesting Plaintiff work less than full-time without health  
15 insurance and a written guarantee of future full employment while  
16 her "replacement" took over her full-time position, creating even  
17 more fear;

18 iv. telling Plaintiff it was unwise not  
19 to take the part-time position, then stating a veiled threat that  
20 Plaintiff would be expected to act like all other teachers who were  
21 not pregnant;

22 v. terminating Plaintiff because of her  
23 pregnancy, stating she appeared stressed because of her pregnancy  
24 or marriage;

25 vi. falsely insinuating/accusing  
26 Plaintiff of engaging in corporal punishment and using force to  
27 discipline a child under her care to justify the termination,  
28

1 thereby substantially decreasing Plaintiff's ability to seek and  
2 obtain future employment as a preschool teacher;

3 vii. gratuitously publicizing those same  
4 allegations to a state agency for inclusion in their permanent  
5 file, perpetuating Plaintiff's inability to seek and obtain future  
6 employment as a preschool teacher;

7 viii. failing to follow through with her  
8 promise to give a good recommendation for Plaintiff once the baby  
9 was born, thereby giving credence to the corporal punishment  
10 allegations.

11 i. Plaintiff's claims of defamation and  
12 intentional infliction of emotional distress are asserted against  
13 Defendant Trinity Church under the doctrine respondeat superior.

14 j. Plaintiff claims that she is entitled to  
15 recover punitive damages for violation of Title VII, 42 U.S.C.  
16 § 2000, for wrongful termination in violation of public policy, for  
17 intentional infliction of emotional distress, and for defamation.

18 2. Defendants' Contentions:<sup>2</sup>

19 a. Defendants claim Plaintiff failed to  
20 mitigate her damages for all claims except the Family Medical Leave  
21 Act claim because Plaintiff did not seek other employment after her  
22 termination.

23 b. Defendants claim that Plaintiff cannot  
24 recover general damages (for depression, anxiety, sleeplessness,  
25 \_\_\_\_\_

26 <sup>2</sup> Those defenses which do not constitute affirmative  
27 defenses have not been listed. Zivkovic v. Southern Cal. Edison  
28 Co., 302 F.3d 1080, 1088 (9th Cir. 2002) ("A defense which  
demonstrates that plaintiff has not met its burden of proof is not  
an affirmative defense. . . [A] defense which points out a defect  
in the plaintiff's prima facie case is not an affirmative defense."

1 humiliation loss of self esteem, etc.) for violation of Title VII,  
2 42 U.S.C. § 2000, for wrongful discharge in violation of public  
3 policy, for defamation, and for intentional infliction of emotional  
4 distress, because any such damages Plaintiff suffered were brought  
5 upon herself by her inappropriate actions which led to her  
6 termination, and/or other events in her personal life.

7 c. Defendant Trinity Church claims it is not  
8 liable for retaliation under Title VII, 42 U.S.C. § 2000, for  
9 publishing a memorandum stating that Plaintiff had inflicted  
10 corporal punishment on a child because all of the allegations in  
11 the memorandum were true.

12 d. Defendants claim they are not liable for  
13 defamation because the contents of the memorandum stating that  
14 Plaintiff had inflicted corporal punishment on a child were  
15 truthful.

16 C. The following issues are not preserved for trial:<sup>3</sup>

17 1. Plaintiff claims Defendant Trinity Church and  
18 Defendant Donna Harrell interfered with her right to take leave  
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20 <sup>3</sup> The parties were warned in the Status (Pretrial  
21 Scheduling) Order filed March 22, 2005, that

22 "since [the] process [of having them delineate trial  
23 issues] is designed to promote efficiency and conserve  
24 judicial resources, 'there is no reason to require that  
25 the elimination of non-trialworthy claims await a  
26 formal motion for summary judgment.'" Berkovitz v. Home  
27 Box Office, Inc., 89 F.3d 24, 29 (1st Cir. 1996). "If  
28 the pretrial [statement] discloses that no material  
facts are in dispute and that the undisputed facts  
entitle one of the parties to judgment as a matter of  
law," the Court may summarily dispose of the case or  
issue. Portsmouth Square v. Shareholders Protective  
Comm., 770 F.2d 866, 868-69 (9th Cir. 1985) (emphasis  
added).

(Order at 9.)

1 under the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-  
2 2654, by (1) failing to properly advise Plaintiff of her rights  
3 under the FMLA, (2) misleading Plaintiff as to her rights under the  
4 FMLA in its employee handbook, (3) requesting that Plaintiff reduce  
5 her hours so that she would not qualify for FMLA leave, and (4)  
6 terminating Plaintiff's employment in order to prevent Plaintiff  
7 from obtaining the benefits of FMLA leave.

8           This claim is not preserved for trial because  
9 nothing in the JPS reasonably indicates Plaintiff sought to invoke  
10 her rights under the FMLA. Bailey v. Southwest Gas Co., 275 F.3d  
11 1181, 1186 (9th Cir. 2002) (stating that defendant did not  
12 interfere with plaintiff's rights under the FMLA because plaintiff  
13 never sought to invoke her rights). The JPS does not indicate  
14 Plaintiff requested leave for her pregnancy, expressly or  
15 otherwise, but rather that Plaintiff told her employer she desired  
16 to continue employment as the "head teacher" throughout her  
17 pregnancy. See id. (stating that plaintiff did not invoke her  
18 rights under the FMLA "expressly or otherwise" because plaintiff  
19 never requested leave and would not have taken leave if offered).  
20 Therefore, Plaintiff's claim that Defendant Trinity Church  
21 interfered with her rights under the FMLA is dismissed.

22           D. In addition to the matters set forth in Local Rule  
23 16-285, the parties shall brief the following points of law in  
24 their trial briefs.

25           1. The elements, standards, and burdens of proof as  
26 to each of Plaintiff's causes of action, including citations of  
27 authority in support thereof.  
28



1                   2.     The elements, standards, and burdens of proof  
2 as to each of Defendant's defenses, including citations of  
3 authority in support thereof.

4                   Notwithstanding Local Rule 16-285, trial briefs shall be  
5 filed with the Court no later than twenty (20) court days prior to  
6 the date of trial. A joint or partial joint trial brief is  
7 permitted. All legal positions briefed in the trial brief shall be  
8 supported with case and applicable statutory authority. See Local  
9 Rule 16-285. If separate or partial separate trial briefs are  
10 submitted, responding briefs, if any, shall be filed with the Court  
11 no later than five (5) court days prior to trial. **The trial**  
12 **brief(s) must include "a summary of points of law, including**  
13 **reasonably anticipated disputes concerning admissibility of**  
14 **evidence, legal arguments, and citations of authority in support**  
15 **thereof."** Local Rule 16-285(a) (3).

16                                   III. WITNESSES

17                   A. Plaintiff expects to call as witnesses, either in  
18 person or by deposition, some or all of the persons listed in  
19 "Attachment 2: Plaintiff's Witness List" attached to the parties'  
20 JPS.

21                   B. Defendants expect to call as witnesses, either in  
22 person or by deposition, some or all of the persons listed in  
23 "Defendants' Witness List" attached to the parties' JPS.

24                   C. Each party may call a witness designated by the  
25 other.

26                   D. No person, other than those named on these witness  
27 lists, will be permitted to testify unless:  
28

1 (1) The party offering the witness demonstrates that  
2 the witness is for the purpose of rebutting evidence which could  
3 not reasonably be anticipated at the pretrial conference; or

4 (2) The witness was discovered after the pretrial  
5 conference and the proffering party makes the showing required in  
6 "E", below.

7 E. If a witness is discovered after the pretrial  
8 conference, counsel for the party offering the witness shall  
9 promptly inform the Court and opposing parties of the existence of  
10 the unlisted witness so that the Court may consider at trial  
11 whether the witness shall be permitted to testify. The witness  
12 will be not be permitted to testify unless:

13 (1) The witness could not reasonably have been  
14 discovered prior to pretrial;

15 (2) The Court and opposing counsel were promptly  
16 notified upon discovery of the witness;

17 (3) If time permitted, counsel offered the witness  
18 for deposition; and

19 (4) If time did not permit, a reasonable summary of  
20 the witness' testimony was provided to opposing counsel.

21 IV. EXHIBITS

22 A. Plaintiff intends to offer in evidence the exhibits  
23 described in "Attachment 1: Plaintiff's Exhibits" attached to the  
24 parties' JPS.

25 B. Defendants intend to offer in evidence the exhibits  
26 described in "Defendants' Trial Exhibits" attached to the parties'  
27 JPS.

1 C. No other exhibits will be permitted to be introduced  
2 unless:

3 (1) The party seeking to use the unlisted exhibit  
4 demonstrates that the exhibit is being used to rebut evidence which  
5 could not reasonably have been anticipated at the pretrial  
6 conference; or

7 (2) The unlisted exhibit was discovered after the  
8 pretrial conference and the offering party makes the showing  
9 required in paragraph "D", below.

10 D. Any party proposing to introduce an exhibit which was  
11 discovered after the pretrial conference shall promptly notify the  
12 Court and opposing counsel of the existence of such exhibit. The  
13 Court will not permit any such exhibit to be introduced unless it  
14 finds:

15 (1) That the exhibit could not reasonably have been  
16 discovered prior to the pretrial conference;

17 (2) The Court and counsel were promptly informed of  
18 the exhibit's existence; and

19 (3) That the offering party has delivered a copy of  
20 the exhibit to opposing counsel, or, if the exhibit may not be  
21 copied, that the offering counsel has made the exhibit reasonably  
22 available for inspection by opposing counsel.

23 E. Plaintiff's exhibits shall be numbered and marked  
24 with colored stickers provided by the Court while Defendant's  
25 exhibits shall be designated by alphabetical letter also marked  
26 with colored stickers provided by the Court. To obtain stickers,  
27 parties should contact the Clerk of Court at (916) 930-4000.  
28

1           The parties are directed to exchange with each other, at  
2     least twenty (20) court days prior to trial, copies of all of their  
3     respective exhibits, marked with exhibit stickers provided by the  
4     Court. Within five (5) court days after receipt and examination of  
5     the exhibits, each party shall file with the Court and serve upon  
6     opposing counsel objections, if any, to the exhibits, referencing  
7     the exhibits as marked by exhibit sticker and specifying the basis  
8     for each objection.<sup>4</sup> Failure to exchange exhibits as ordered could  
9     result in the exhibit not being used at trial and/or the imposition  
10    of sanctions. The failure to make objections in the manner  
11    prescribed by this section shall constitute a waiver of objections.  
12    A party seeking to admit into evidence an exhibit to which no  
13    objection was made must identify said exhibit for the record and  
14    then move it into evidence.

15           Counsel shall produce all exhibits to the Clerk's Office  
16    on the Friday before the before trial date, no later than 4:00 p.m.  
17    At that time, the parties shall also furnish the Court with a copy  
18    of each exhibit, unless the exhibit is physically incapable of  
19    being reproduced. Failure to produce exhibits as ordered could  
20    result in waiver of the right to offer those exhibits. Each party  
21    submitting exhibits shall furnish a list to the Court, the  
22    courtroom deputy and opposing counsel itemizing the exhibits.

23    ///

24    ///

25    ///

26    ///

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27  
28           <sup>4</sup> The parties have leave to file joint exhibits. The above  
procedure is designed for separate exhibits.

1           V. FURTHER PREPARATION FOR USE OF DISCOVERY DOCUMENTS<sup>5</sup>

2           A. It is the duty of counsel to ensure that any  
3 depositions which are to be used at trial for any purpose shall  
4 have been filed with the clerk, and counsel are cautioned that a  
5 failure to discharge this duty may result in preclusion of the use  
6 of the unfiled depositions or in the imposition of such other  
7 sanctions as the Court deems appropriate.

8           B. No later than twenty (20) court days before the trial  
9 commencement date, counsel for each party shall serve on the other  
10 parties a statement designating all answers to interrogatories and  
11 all portions of depositions (except for passages to be used solely  
12 for refreshing recollection, impeachment or rebuttal). No later  
13 than ten (10) court days before the trial commencement date,  
14 counter-designations of other portions of these discovery documents  
15 may be served. No later than five (5) court days before trial, the  
16 parties shall file and serve any preserved evidentiary objections  
17 to any designated discovery, or said objections are waived.

18           VI. FURTHER DISCOVERY OR MOTIONS

19           Pursuant to the Court's Pretrial Scheduling Order, all  
20 discovery and law and motion was to have been completed prior to  
21 the date of the final pretrial conference. That order is  
22 confirmed. The parties are, of course, free to conduct any  
23  
24

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25           <sup>5</sup> Counsel for the parties are required to meet and confer  
26 on whether it is appropriate to submit any documents to the judge  
27 prior to trial. If the parties decide this is appropriate, they  
28 shall reflect their agreement in a stipulation which has attached  
thereto whatever documents they agree can be considered by the  
judge before trial. The stipulation should be filed and submitted  
to the judge's chambers at the parties' earliest convenience.

1 additional discovery they desire pursuant to informal agreement.  
2 However, any such agreement will not be enforceable in this Court.

3 VII. SETTLEMENT NEGOTIATIONS

4 No settlement conference is scheduled in this matter. If  
5 the parties believe that a settlement conference would be  
6 productive and facilitate resolution of this case, the parties may  
7 contact the Court. If the Court schedules a settlement conference  
8 at the request of the parties, each party would be directed to have  
9 a principal with authority to settle the case on any terms present  
10 at the settlement conference.

11 In addition, each party would have to submit a settlement  
12 conference statement directly to the chambers of the settlement  
13 judge, five (5) court days prior to the settlement conference.  
14 Such statements would not have to be filed with the clerk nor  
15 served on opposing counsel. However, each would be required to  
16 notify the other party or parties that the statement was submitted  
17 to the judge's chambers.

18 VIII. AGREED STATEMENT

19 The parties shall submit a short, jointly-prepared  
20 statement concerning the nature of this case that can be read to  
21 the jury at the commencement of trial. The statement shall be  
22 provided to the Court no later than ten (10) court days before the  
23 commencement of trial. If the parties fail to do this, they may be  
24 required to give their respective opening statements before voir  
25 dire. Separate statements shall be submitted if agreement is not  
26 reached.

IX. SEPARATE TRIAL OF ISSUES

The trial will be conducted in two phases: liability and punitive damages. If the jury finds punitive damages are recoverable in the liability phase, trial on the amount of punitive damages will immediately occur. During the first phase of the trial, the jury will be given a liability instruction on punitive damages along with the other closing instructions and a verdict form which will include the question whether punitive damages should be awarded. If the answer is yes, the second phase of the trial would then occur with the presentation of financial condition evidence pertinent to the amount of punitive damages, following which the parties would present closing argument on that issue and a second phase jury instruction would be given to the jury on the issue. The jury would then deliberate on the issue and fill in a punitive damages verdict form.

X. JURY INSTRUCTIONS, VOIR DIRE, AND VERDICT FORMS

A. The parties are to prepare jury instructions, in the manner specified in paragraph B below. Counsel shall tailor all general instructions to the facts and issues in suit.

B. Counsel are directed to confer and to attempt to agree upon a joint set of jury instructions. All instructions, both general and specific, shall be submitted in the exact numerical order counsel desires them given to the jury and shall be tailored to the facts and issues in suit.

The joint set of instructions shall be filed with the court clerk fifteen (15) court days prior to the date of the trial and shall be identified as the "Jury Instructions Without Objection." See L.R. 51-163(b). As to instructions on which there

1 is dispute, the parties shall adhere to the following procedure:

2 1) the party offering the disputed instruction(s) shall submit the  
3 instruction(s) as its package of proposed jury instructions, shall  
4 submit a brief memorandum in support of the proposed instruction(s)  
5 and shall number the disputed instruction in a manner that shows  
6 where each disputed instruction should be placed in the tendered  
7 agreed upon instructions. The contested instruction(s) and  
8 memorandum in support shall be filed with the joint set of  
9 instructions fifteen (15) court days prior to the date of the  
10 trial; 2) the party opposed to the contested instruction(s) shall  
11 submit a brief memorandum succinctly stating the legal basis of the  
12 objection(s); 3) the memoranda in opposition to the contested  
13 instruction(s) shall be filed ten (10) court days prior to the date  
14 of the trial.

15 C. All instructions shall be, to the extent possible,  
16 concise, understandable, and neutral statements of law. They shall  
17 be prepared in accordance with Local Rule 51-163. Ninth Circuit  
18 Pattern Instructions are preferred.

19 D. It is the parties' responsibility to ensure that  
20 jury instructions are submitted on all issues preserved for trial  
21 in accordance with the schedule set forth above. Pursuant to Local  
22 Rule 51-163, instructions not presented in accordance with this  
23 Order will be refused unless it is shown either (1) that the  
24 necessity for the request arose in the course of trial; the  
25 instructions could not reasonably have been anticipated prior to  
26 trial from the Final Pretrial Order; and the request for such  
27 additional instructions is presented to the Court as promptly as  
28



1 possible; or (2) that the refusal to give such instructions would  
2 constitute manifest injustice under Rule 16(e).

3 Likewise, any objections to proposed instructions not  
4 made in accordance with this Order will be overruled as untimely  
5 unless it is shown either (1) that the grounds therefor arose in  
6 the course of trial and the intention to make such objections is  
7 communicated to the Court as promptly as possible, or (2) that the  
8 giving of such instructions would constitute plain error.

9 E. Most of the examination of prospective jurors is  
10 conducted by the Court. The parties are directed to meet and  
11 confer and attempt to agree upon a joint set of proposed voir dire  
12 questions. These questions shall include any voir dire questions  
13 supplied by the Court that the parties believe are necessary. The  
14 joint set of voir dire questions shall be filed with the Court  
15 fifteen (15) court days prior to the date of the trial. Parties  
16 may also submit proposed voir dire questions which are disputed.  
17 Disputed voir dire questions shall be filed with the Court fifteen  
18 (15) court days prior to the date of the trial and shall be  
19 accompanied by an explanation as to the need for the question and  
20 supporting case authority when available. The opposing party shall  
21 respond with reasons for the opposition and any supporting case  
22 authority no later than ten (10) court days prior to the date of  
23 trial. Each side is granted fifteen (15) minutes to conduct voir  
24 dire following the Court's examination of prospective jurors.

25 F. The parties shall file a joint verdict form  
26 concurrently with proposed jury instructions fifteen (15) court  
27 days prior to the commencement of trial. See L.R. 51-163(e). A  
28 special verdict or interrogatories shall be included for all

1 factual disputes submitted to the jury that must be resolved before  
 2 questions of law can be decided, and for any other issue on which  
 3 specific responses are desired. The verdict form shall be prepared  
 4 in accordance with Local Rule 51-163(e). At the same time, where  
 5 disagreements exist, the parties shall explain the disagreement and  
 6 submit points and authorities supporting their respective  
 7 positions.

8 At the time of electronically filing the jury  
 9 instructions and verdict form, counsel shall also submit a copy of  
 10 the sanitized joint jury instructions, the sanitized disputed jury  
 11 instructions, and the joint verdict form to the Court by email to  
 12 geborders@caed.uscourts.gov in accordance with L.R. 51-163(b)(1).

13 G. The failure of one or more of the parties to  
 14 participate in the preparation of joint jury instructions, proposed  
 15 voir dire questions, or verdict form does not excuse the other  
 16 parties from their obligation to timely file these documents with  
 17 the Court in accordance with this Order. In the event that a party  
 18 fails to participate as ordered, the party timely submitting these  
 19 documents shall include a declaration explaining why it was unable  
 20 to obtain the cooperation of the other party or parties.

#### 21 XI. USE OF STRUCK JURY SELECTION SYSTEM

22 Eight (8) jurors will be impaneled. The "struck jury"  
 23 system will be used to select the jury.<sup>6</sup> At the beginning of the  
 24 \_\_\_\_\_

25 <sup>6</sup> As explained in United States v. Blouin, 666 F.2d 796,  
 26 798 (2d Cir. 1981), "the goal of the 'struck jury' system is to  
 27 whittle down an initially selected group . . . [to the amount of  
 28 jurors] who will serve as the petit jury." The selected group  
 consists of the jurors who will hear the case, plus the number of  
 jurors required to enable the parties to use the combined number of  
 peremptory challenges allotted to both sides for striking jurors

(continued...)

voir dire process, eighteen prospective jurors, randomly selected by the Jury Administrator, will be seated for voir dire.<sup>7</sup> The order of the jurors' random selection is reflected by the order in which they will be seated. The first randomly selected juror will be in jury seat number one, which is at the extreme right-hand side of the jury box in the top row as the jury box is viewed from the well of the courtroom. The eighth juror will be in the eighth seat. The ninth selected juror will occupy the seat located at the extreme right-hand side of the jury box in the bottom row. The fifteenth seat will be in the left-hand side of that row. Three chairs will be placed in front of the jury box. The sixteenth juror will occupy the seat on the right and the eighteenth juror will occupy the seat on the left. The first eight (8) jurors on a list, which shall be given to counsel, will constitute the petit jury unless one or more of those eight (8) is excused for some reason. Assuming that the first and fifth jurors on the list are excused, the second listed juror becomes the first, and the other jurors' numbers are changed accordingly, with the ninth juror on the list becoming seventh on the list; however, the jurors continue to be identified by their original numbers.

Following the voir dire questioning, each side will exercise its three allowed peremptory strikes.<sup>8</sup> A copy of the

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<sup>6</sup>(...continued)  
from the group. Typically extra jurors are included in the select group in the event the minimum amount of jurors required for the "struck system" is reduced "for cause" or some other reason.

<sup>7</sup> More could be seated.

<sup>8</sup> During the questioning, the attached Query Re Excuse Potential Jurors form could be given to the parties to determine if  
(continued...)

"strike sheet" which will be used is attached to this Order.

Generally, the potential jurors are given a break for the amount of time the parties estimate it will take them to exercise peremptory strikes. Therefore, before the striking process begins, the parties are requested to provide an estimate of how long it will take to exercise their peremptory strikes so the potential jurors can be allowed to take a break for that amount of time. Peremptory strikes will be exercised silently, by passing the strike sheet between the parties, with the Plaintiff going first. To use a strike, write the seat number of the juror above the line where the strike is required to be designated.<sup>9</sup> A party who does not use a strike waives any further right to exercise that strike and is required to reflect this waiver by writing the word "pass" on the strike sheet where the strike was supposed to have been exercised.

## XII. ATTORNEYS FEES

The parties are referred to Local Rule 54-293 concerning the post-trial procedure for seeking an award of attorney's fees.

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<sup>8</sup>(...continued)  
a particular juror should be excused. The attached for cause form will also be used.

<sup>9</sup> For example, assuming Plaintiff elects to strike the juror in seat number 6, that strike will be exercised and then the strike sheet is give to defense counsel. Assuming defense counsel then strikes the juror in seat 4, the first line of the strike sheet will appear as follows:

Plaintiff	1 <u>6</u>	Defendant	1 <u>4</u>
-----------	------------	-----------	------------

Defense counsel would then give the strike sheet back to Plaintiff so she could exercise her second strike.

1                   XIII.   JURY INSTRUCTION AND VERDICT FORM CONFERENCE

2                   A jury instruction and verdict form conference will be  
3 scheduled if necessary. See Local Rule 51-163(f). The attorney  
4 who will try the case for each party shall attend the conference.  
5 The purpose of the conferences is to finalize these matters, to the  
6 extent possible, before trial. The possibility of conferences  
7 being scheduled does not relieve the parties from their obligation  
8 to comply with all provisions of this Order.

9                   Trial to a jury is set for February 28, 2006.<sup>10</sup> A trial  
10 day will commence at 9:00 a.m. and will adjourn at approximately  
11 4:30 p.m. At the first phase of the trial, each side has fifteen  
12 (15) minutes within which to make an opening statement to the jury  
13 and sixty (60) minutes within which to make a closing argument. If  
14 trial proceeds to the second phase, each side has ten (10) minutes  
15 within which to make a closing argument on the punitive damage  
16 issue. Counsel are to call Shani Furstenau, Courtroom Deputy, at  
17 (916) 930-4114, one week prior to trial to ascertain the status of  
18 the trial date.

19                   XIV.   COMMUNICATION WITH JURY

20                   The Court intends to communicate the following to the  
21 jury just before it retires to deliberate:

- 22                   1.   Is the United States Marshal's representative  
23                   present who will take charge of the jury?  
24                   2.   Deputy Clerk, please give the oath to the United  
25                   States Marshal's representative.

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26  
27                   <sup>10</sup>   **The parties are required to meet and confer about the**  
28 **length of the trial and to file a document no later than 20 court**  
**days before trial in which the length of trial is estimated.**

- 1           3.    The jury may take breaks at will, **without advance**  
2               **permission**, under the general supervision of the  
3               United States Marshal's representative.
- 4           4.    The jury may go to lunch when they desire, **without**  
5               **advance permission**, under the general supervision of  
6               the United States Marshal's representative. When  
7               the jury leaves for lunch, **the United States**  
8               **Marshal's representative shall tell my courtroom**  
9               **deputy clerk** so that I, my staff, the lawyers, and  
10              the parties can be relieved from standby status.  
11              This allows those on standby status to go to lunch  
12              at the same time the jury has lunch.
- 13          5.    The jury is authorized to adjourn for the evening  
14               **without advance permission**, and without having to  
15               return to this courtroom to be excused by me in  
16               front of the parties, but **the United States**  
17               **Marshal's representative shall tell my deputy**  
18               **courtroom clerk** when the jury adjourns so that the  
19               judge, the judge's staff, the lawyers, and the  
20               parties can be relieved from standby status.
- 21          6.    When deliberations are continued the day after  
22               evening adjournment, jurors are permitted to proceed  
23               directly to the jury deliberation room. But jurors  
24               are to wait until all jurors are present before  
25               resuming deliberations.
- 26          7.    We desire you to deliberate between the hours of  
27               9:00 a.m. and 4:30 p.m., as necessary. However, you  
28               may deliberate for a shorter or longer period if you

1           desire, provided all of you are in agreement.

2           Otherwise, you should let me know about the  
3           disagreement.

4           8.   If you have a cell phone and/or a device with a  
5           wireless internet connection, you must give it to  
6           the United States Marshal's representative before  
7           you go into the jury deliberation room so that we  
8           can be assured that there is no interference with  
9           your deliberations. That representative will return  
10          it when you leave the jury deliberation room.

11          9.   The United States Marshal's representative will  
12          maintain a post outside the jury deliberation room  
13          to protect the jury from outside influences or  
14          visitors. That representative shall not communicate  
15          with you about the case or the court system because  
16          such conversations could be misconstrued as a  
17          communication that seeks to influence the jury.  
18          Stay in the jury room until all jurors are ready to  
19          leave for a break or lunch.

20          10.  Please escort all jurors to the deliberation room.

21  
22          Dated:   December 9, 2005

23  
24                               /s/ Garland E. Burrell, Jr.  
25                               GARLAND E. BURRELL, JR.  
26                               United States District Judge  
27  
28

STRIKE SHEET

Plaintiff 1\_\_\_\_\_

2\_\_\_\_\_

3\_\_\_\_\_

Defendants 1\_\_\_\_\_

2\_\_\_\_\_

3\_\_\_\_\_



Query re Excuse Potential Juror

Do you Agree that Juror No. \_\_\_\_\_ should be excused for the reason stated by the juror or for any other reason? (Check applicable box below)

Plaintiff's Attorney

Defendants'  
Attorney

RESPONSE:

☐☐☐☐

Yes

No

Yes

No

Whether Jurors Present During Exercise of Peremptory Challenges

Can the jury be excused for the amount of time it will take to exercise peremptory challenges? (Set forth response in box below)

	Plaintiff's Attorney		Defendants' Attorney	
RESPONSE:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Yes	No	Yes	No

How long do you estimate it will take you to exercise peremptory challenges? (Set forth minutes in box below)

	Plaintiff's Attorney	Defendants' Attorney
MINUTES:	<input type="text"/>	<input type="text"/>

FOR CAUSE DOCUMENT  
Plaintiff's Counsel

If you have challenges for cause, state the seat number of the juror involved and a brief explanation of the reason for the challenge.

Seat \_\_\_\_\_

Explanation: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Seat \_\_\_\_\_

Explanation: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Seat \_\_\_\_\_

Explanation: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Seat \_\_\_\_\_

Explanation: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

List seat numbers of other for cause challenges: \_\_\_\_\_, \_\_\_\_\_,

\_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.

**CHECK THIS BOX IF YOU HAVE NO CHALLENGES FOR CAUSE:**

☐

Signed: \_\_\_\_\_

FOR CAUSE DOCUMENT  
Defendants' Counsel

If you have challenges for cause, state the seat number of the juror involved and a brief explanation of the reason for the challenge.

Seat \_\_\_\_\_

Explanation: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Seat \_\_\_\_\_

Explanation: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Seat \_\_\_\_\_

Explanation: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Seat \_\_\_\_\_

Explanation: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

List seat numbers of other for cause challenges: \_\_\_\_\_, \_\_\_\_\_,

\_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.

**CHECK THIS BOX IF YOU HAVE NO CHALLENGES FOR CAUSE:**

☐

Signed: \_\_\_\_\_